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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DENNIS MCGRAW, Defendant and Appellant.	A152171 (Solano County Super. Ct. No. VCR161833)

In *People v. Elmore* (2014) 59 Cal.4th 121 (*Elmore*), our Supreme Court held that a mentally ill defendant is not entitled to an instruction on unreasonable self-defense based on a purely delusional threat. A delusional belief in the need to defend oneself is, in fact, a claim of insanity. Under our two-phase statutory scheme, the defendant is presumed to be sane in the guilt phase of trial. The issue of insanity must wait for the sanity phase.

This case presents a similar issue—whether a mentally ill defendant is entitled to an instruction on involuntary manslaughter based on a delusional belief that shooting a person in the head would not kill him. Following the reasoning of *Elmore*, we hold the defendant, Dennis McGraw, is not entitled to the instruction because this is a claim of insanity reserved for the sanity phase of trial.

Accordingly, we affirm the conviction. We vacate the sentence, however, so the trial court may consider striking a firearm enhancement term pursuant to amended Penal Code section 12022.5, subdivision (c).[1]

BACKGROUND

A.

"Persons who are mentally incapacitated" are deemed unable to commit a crime as a matter of law. (§ 26.) In turn, section 25, subdivision (b), provides that mental incapacity is determined by the *M'Naghten* test for legal insanity. (*Elmore, supra*, 59 Cal.4th at p. 140, citing *M'Naghten's Case* (1843) 8 Eng.Rep. 718, 722.) If a defendant enters alternative pleas of not guilty and not guilty by reason of insanity, as here, trial is bifurcated. First, in the guilt phase, the insanity plea is ignored, and the defendant is conclusively presumed to have been legally sane at the time of the offense. (§ 1026, subd. (a); *Elmore*, at pp. 140–141.) If the defendant is found guilty, the trial proceeds to the sanity phase, and the defendant bears the burden to prove by a preponderance of the evidence that he or she was unable either to understand the nature and quality of the criminal act or to distinguish right from wrong when the act was committed. (§§ 25, subd. (b), 1026, subd. (a); *Elmore,* at p. 141.)

B.

In 2002, a jury convicted Dennis McGraw of the first degree murder (§ 187, subd. (a)) of Jason Garfield and found true allegations he personally used and discharged a firearm in the commission of the murder (former §§ 12022.5, subd. (a), 12022.53, subd. (d)). On direct appeal, we affirmed the judgment (*People v. McGraw* (Sept. 2, 2004, A101893) [nonpub. opn.]) but also issued an order to show cause on McGraw's habeas claims that his trial counsel was ineffective by failing to argue imperfect self-defense and offer evidence of McGraw's mental health. The trial court granted McGraw's habeas corpus petition, set aside the judgment in its entirety, and ordered a

[1] Undesignated statutory references are to the Penal Code.

new trial. McGraw, however, was found incompetent to stand trial (§§ 1367, 1368, 1370, subd. (a)(1)(B)).

Several years later, in 2013, the court found McGraw competent and reinstated criminal proceedings. McGraw entered dual pleas of not guilty and not guilty by reason of insanity. The trial was bifurcated into guilt and sanity phases.

C.

In 2002, McGraw and Garfield lived in adjacent apartments in Vallejo. Garfield repeatedly harassed McGraw—e.g., calling him names, threatening him, padlocking the gate to the rear of their building, elbowing him on the stairs, and knocking on the wall and door. Garfield's roommate, Andre Brown, confirmed Garfield had threatened McGraw's life, including on the day of the shooting. McGraw never behaved aggressively toward Garfield.

McGraw testified Garfield started pounding on his door about a year before the shooting. McGraw called the police, and the harassment stopped until about two months before the killing, when Garfield resumed the pounding on a daily basis. McGraw telephoned police several times about Garfield's renewed harassment and threats, but when they came Garfield did not answer the door and no other action was taken by police. McGraw said he was "in a state of horror" and "scared to death" for a month before the shooting.

McGraw purchased a .22-caliber semiautomatic rifle to protect himself from Garfield. When Garfield's door-pounding became more frequent, McGraw began carrying the rifle "everywhere in the apartment in case Garfield burst through the front door." He practiced shooting the rifle by firing into stacks of newspapers in his apartment and by firing out the window into an empty lot. He also shot a neighbor's dog because it repeatedly barked at him. After McGraw shot the dog, the dog never barked at him again, and he felt he had "one less problem."

On the day he shot Garfield, McGraw left his apartment through the building's rear door because his key did not unlock the building's front door. He brought his rifle "[i]n case Garfield tried to pounce on [him] coming and going." He also carried a

screwdriver in case his gun jammed and a tire iron in case Garfield padlocked the gate. As he left, Garfield yelled out the window, "I'm going to get you, [McGraw]."

When McGraw returned home he saw a padlock on the building's rear gate. He went to the front of the building carrying his rifle, screwdriver, tire iron, and two bags of groceries. He saw Garfield, who started running toward him. McGraw headed to his car to escape. McGraw testified he "wasn't going to shoot except at the absolutely last moment as an absolutely last resort," but Garfield kept running and McGraw had no time to open the car door. When Garfield was about one foot away, McGraw put his groceries down, "put [his] finger on the trigger and aimed the . . . barrel and fired the first shot" at Garfield.

After the first shot, Garfield turned and ran around McGraw's car. McGraw chased him. He fired three shots at Garfield and then thought "maybe I can get a shot to the head." When Garfield "laid down" in the street, McGraw, believing the first three shots "hadn't seemed to do anything" and still afraid he would be killed by Garfield, fired at Garfield's head from a distance of about two feet away. He tried to fire again, but the gun jammed. He was trying to fix the jam with his screwdriver when the police arrived.

Vallejo Police Officer Les Bottomley was on patrol when he heard an intense scream. Upon arrival at the scene, he saw Garfield lying on the street, holding his left side, screaming, and extending his arm defensively in front of his face. As Bottomley got out of his car, he saw McGraw point an X-shaped object (which turned out to be the gun and the tire iron) directly at Garfield's head and fire a shot from about two feet away. Garfield immediately went limp. Bottomley, who was in uniform and had his own gun drawn, repeatedly ordered McGraw to drop his gun. McGraw ignored him and tried to clear the jam in the rifle. Eventually he dropped the rifle and, after a scuffle, was arrested.

The police found five .22-caliber casings at the scene—two on the sidewalk and three in the street near a parked car. They also found two grocery bags, a .22-caliber rifle, and a tire iron. The rifle had been configured without a stock, had an unfired round in the chamber, and was apparently jammed.

An autopsy revealed Garfield suffered three gunshot wounds, inflicted from an undetermined distance, to the left shoulder, left groin, and right thigh. A fourth gunshot wound was a "contact wound" to the back of the head, which indicated the gun's muzzle had been pressed against Garfield's scalp when fired. The head wound alone would have been fatal.

During a videotaped police interview, McGraw explained he lived in continual fear of Garfield because Garfield appeared to weigh 250 pounds and was "all chunky [with] muscles." Actually, Garfield was about five feet six inches tall and weighed approximately 175 pounds.

McGraw told detectives he was "hoping to kill" Garfield after Garfield "almost busted down the door" three weeks before the shooting. McGraw resolved to "pump as many bullets into" Garfield's "center portion" as he possibly could if Garfield ever "busted through," "charged" him, or "tried to trap" him in the future. "I had already determined that if [Garfield] did charge me, which would be on his part, attempted murder, . . . that I would try to kill him and I would just pump as many bullets into him as I possibly could . . . [t]o stop him once and for all, because it's been six months, every day. Threat. Threat. Threat. Yelling. Banging on the walls. Yelling out the window, just no end to it. Just no end to it." McGraw said he wanted "[j]ust to put an end to that person. No more worrying about him busting through that door and pounding on, busting though the door and charging at me when I'm going to my car."

In the video, McGraw described the shooting. McGraw first fired his rifle at Garfield's midsection. Having hit Garfield once, McGraw explained that Garfield's body "looked like clay or something the way it was moving around." "I was having trouble aiming at him the way he was moving, but finally I got another shot into him and then he went out on the ground and this guy is just so phoney and such a liar, you don't know what he's thinking."

McGraw then explained his decision to shoot McGraw in the head. Although Garfield was on the ground, McGraw still believed he needed to "incapacitate him and keep him from coming at me." "I decided I was going to make sure and put him out and

I thought the best way to do that would be to put one through the middle of his head. [¶] So it took me about five minutes. He was moving all around . . . and all these extremely odd evasion tactics . . . and finally I got a shot at his head, at the center of his head, and so I shot him and then I took another shot, and then the gun jammed."

Although he shot Garfield in the head, he "never thought of the possibility [Garfield] might die," as he "didn't think a .22 could kill somebody." He said, "they'll probably be able to dig [the bullets] out," and Garfield "would probably do just fine," albeit with "less of a thrust" in his voice. When the detectives told McGraw that Garfield was dead, McGraw did not believe them. He said it was "only three bullets," and "I'd have to see the dead body or something."

When asked what he was thinking at the time of the shooting, McGraw replied: "the only thing I was thinking was, 'aim and incapacitate,' 'aim and incapacitate[.]' " McGraw "knew" he had done the right thing by shooting Garfield. In McGraw's view, there was nothing wrong "with shooting a guy or using any kind of force necessary to stop a threatening attack."

Pablo Stewart, M.D., testified as a psychiatry expert. Stewart testified that McGraw had been diagnosed as schizophrenic and displayed symptoms of schizophrenia, such as "delusional thought content," in the video of his police interview after the shooting. Stewart explained schizophrenia is a "chronic psychotic illness" characterized by the presence of hallucinations or delusions. A delusion, he explained, "is a firmly-held false belief that persists in spite of evidence to the contrary." Those suffering from schizophrenia are "much more sensitive to stress," often experience paranoia, and may "lose touch with reality" by experiencing impaired perception and reaction to their surroundings. In short, schizophrenia may affect the individual's "ability to think accurately." Stewart opined McGraw was suffering from schizophrenia on the day of the shooting.

D.

The jury acquitted McGraw of murder but found him guilty of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)) and found true the firearm use allegation (former § 12022.5, subd. (a)).

E.

In the sanity phase, McGraw's counsel argued McGraw was schizophrenic at the time of the killing and was driven by delusions. Two court-appointed experts testified. Randall Solomon, M.D., explained McGraw had schizophrenia, and had been under treatment for it, since before the shooting. He said McGraw was paranoid, delusional, and insane at the time of the act. McGraw did not know right from wrong, as illustrated by his fear Garfield would still be able to attack him after he was shot and lying on the ground. When McGraw put the gun to Garfield's head, "[h]e wasn't thinking that this will kill him, . . . [h]e was thinking . . . [that] this is what I need to do to be safe." Janice Nakagawa, Ph.D., came to similar conclusions. "[W]hen he shot the victim, he really did not have any notion that it was going to kill him . . . which is pretty crazy."

The jury was unable to reach a unanimous verdict on McGraw's sanity, and the court declared a mistrial. Pursuant to a negotiated disposition, McGraw withdrew his plea of not guilty by reason of insanity with the understanding he would receive a state prison sentence of 16 years and retain the right to challenge his conviction and sentence on appeal. McGraw was sentenced to the midterm (six years) for voluntary manslaughter (§ 193, subd. (a)) and the upper 10-year term for the firearm enhancement (former § 12022.5, subd. (a)). Because his presentence credit for time served exceeded the imposed sentence, the sentence was deemed served and McGraw was ordered to report to his parole officer.

DISCUSSION

A.

McGraw contends the trial court erred by failing to instruct the jury on involuntary manslaughter because the jury may have found, due to his mental illness, he did not act with either intent to kill or conscious disregard for life when he shot Garfield in the head.

(*People v. Nelson* (2016) 1 Cal.5th 513, 555–556.) McGraw cites his own statements he did not think a .22 caliber rifle could kill a person and Dr. Stewart's testimony McGraw was schizophrenic and delusional. We agree with the People that McGraw is asserting an insanity claim, which cannot be raised at the guilt phase. (*Elmore*, *supra*, 59 Cal.4th at pp. 140–142, 145–146; *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1210–1211 (*McGehee*).)

1.

The trial court instructed the jury on justifiable homicide, first and second degree murder, and voluntary manslaughter under sudden quarrel/heat of passion and imperfect self-defense theories. At defense counsel's request, the trial court gave a pinpoint instruction (CALCRIM No. 3428) that the effect of mental disease, defect, or disorder could be considered when determining whether McGraw formed the requisite intent for any crime. However, the jury was not instructed on involuntary manslaughter.

Involuntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) "Murder is the unlawful killing of a human being . . . with malice aforethought" (§ 187, subd. (a)), either express or implied (§ 188). (*People v. Rios* (2000) 23 Cal.4th 450, 460.) "Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger." (*Elmore*, *supra*, 59 Cal.4th at p. 133.) Involuntary manslaughter is the unlawful killing of a human being *without* malice—that is, without intent to kill and without conscious disregard for life. (§ 192, subd. (b); *People v. Butler* (2010) 187 Cal.App.4th 998, 1006.) While the Legislature has eliminated the ability of a defendant to argue that he lacked the *capacity* to form the mental state required for murder, a defendant may show that, because of a mental illness, he did not *actually* do so and thus, at most, is guilty of involuntary manslaughter. (*People v. Rogers* (2006) 39 Cal.4th 826, 884; *People v. Saille* (1991) 54 Cal.3d 1103, 1117; see § 28, subds. (a), (b).)

Because McGraw's trial counsel did not request such an instruction, the question is whether the trial court had a sua sponte duty to give it. Even absent a request, a trial

court must instruct the jury on any lesser offense if there is substantial evidence that only the lesser crime was committed. (*People v. Smith* (2013) 57 Cal.4th 232, 239.) "[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other." (*Ibid*.)

2.

The issue here turns on the line between diminished actuality, which is properly adjudicated at the guilt stage, and insanity, which is not. Our high court recently explained where to draw that line in *Elmore*.

The *Elmore* court considered whether a trial court erroneously refused a defendant's request for instructions on self-defense "based solely on a defendant's delusional mental state." (*Elmore, supra*, 59 Cal.4th at p. 132; see *id.* at p. 134.) The mentally ill defendant used a sharpened paint brush handle to stab a woman to death at a bus stop. He requested an unreasonable self-defense instruction, relying on his testimony that unspecified hallucinations made him sincerely (albeit unreasonably) believe he needed to defend himself despite no evidence the woman had threatened him in any way. (*Id.* at pp. 130–132.)

Elmore relied on two grounds for its conclusion the defendant was not entitled to such an instruction. (*Elmore, supra*, 59 Cal.4th at pp. 134–146.) First, the court considered case law stating unreasonable self-defense is a form of mistake of fact based on the objective circumstances. (*Id*. at pp. 135–139.) A mistake of fact is founded upon a negligent perception of facts, not a delusion. (*Id.* at p. 136.) " 'A person acting under a delusion is not negligently interpreting facts; instead, he or she is out of touch with reality.' " (*Ibid*.) The court concluded unreasonable self-defense is unavailable when the defendant acts on a threat that exists only in his mind. (*Id.* at p. 137.)

The second ground is based on the statutory scheme that limits evidence of insanity at the guilt phase. The court observed section 28, subdivision (a), allows evidence of mental disorders on whether the defendant actually formed the mental state required for a specific intent crime. (*Elmore, supra*, 59 Cal.4th at p. 139.) But while the

language of the statute would seem to allow a defendant to argue a delusion precluded him from forming the requisite intent, the court held that the statute is limited in this context. (*Id*. at p. 141.) "A claim of unreasonable self-defense based solely on delusion is quintessentially a claim of insanity under the *M'Naghten* standard of inability to distinguish right from wrong." (*Id.* at p. 140.) That evidence can only be presented at the sanity phase (§§ 1020, 1016), where the defendant bears the burden of proving insanity by a preponderance of the evidence (§§ 1026, subd. (a), 25, subd. (b)), not the guilt phase where the defendant is presumed to be sane and the question of sanity is irrelevant. (*Elmore*, at p. 141.) Otherwise, the prosecution would improperly bear the burden of proving beyond a reasonable doubt the defendant was not insane. (*Id.* at p. 145.)

Although the defendant in *Elmore* sought instructions on unreasonable self-defense, these same statutory limitations apply equally to the diminished actuality defense. Indeed, the *Elmore* court said so. "Section 28(a) allows defendants to introduce evidence of mental disorder to show they did not actually form a mental state required for guilt of a charged crime. But the scope of the diminished actuality defense is necessarily limited by the presumption of sanity," which bars a defendant from claiming he was not guilty because he is insane. (*Elmore, supra*, 59 Cal.4th at p. 141.) The Legislature amended section 28, subdivision (a), to codify this distinction after the high court removed it in *People v. Wetmore* (1978) 22 Cal.3d 318, 324–326. (*Elmore*, at pp. 142–144.) In doing so, the Legislature "certainly did not intend to allow defendants to . . . argue first that their mental condition made them guilty of a lesser crime, and then that the same condition made them not guilty at all by reason of insanity." (*Id.* at p. 145, fn. omitted.)

Consequently, at the guilt stage, a defendant is permitted to offer evidence of mental illness short of insanity (§ 28, subd. (a)) but not a purely delusional mental state. (*Elmore*, *supra*, 59 Cal.4th at pp. 136–137, 139–146.) The court emphasized a delusion is not tantamount to insanity if it is grounded in facts, even when those facts are distorted by mental illness. (*Id.* at pp. 137, 146.) "A delusional defendant holds a belief that is divorced from the circumstances" and has no "objective correlate." (*Id*. at p. 137.) "A

person who sees a stick and thinks it's a snake is mistaken . . . [but a person] who sees a snake where there is nothing snakelike . . . is deluded."[2] (*Ibid*.)

3.

The Third District recently applied *Elmore* to limit involuntary manslaughter based on diminished actuality. In *McGehee*, the defendant, who suffered from a psychotic disorder, was convicted of second degree murder after he stabbed his mother 10 times in the neck, chest, and abdomen. On appeal, the defendant argued the trial court should have sua sponte instructed the jury, during the guilt phase, on diminished actuality involuntary manslaughter as a lesser included offense. (*McGehee, supra*, 246 Cal.App.4th at pp. 1194, 1202–1203, 1207.) Specifically, the *McGehee* defendant conceded he acted with intent to kill when he repeatedly stabbed his mother. But he argued the jury could have found the killing to be without express or implied malice if they found he did not believe he was stabbing a human due to his delusion his mother was a demon. (*Id*. at p. 1208.)

The Third District concluded the defendant's argument was "foreclosed by the reasoning of *Elmore*." (*McGehee, supra*, 246 Cal.App.4th at p. 1208.) The court explained: "[The] defendant argues he was entitled to involuntary manslaughter instructions because substantial evidence supported the view he hallucinated an attack by a demon, and therefore did not intend to kill *a human being*, but instead intended to kill a demon. This too is quintessentially a claim of insanity. Its rationale is that because of defendant's mental illness, he was unable to understand the nature and quality of the

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[2] McGraw notes that *People v. Padilla* (2002) 103 Cal.App.4th 675, 678–679, and *People v. McCarrick* (2016) 6 Cal.App.5th 227, 245–246, hold that evidence of delusions or hallucinations is admissible to negate premeditation and deliberation under a diminished actuality theory. That question is not presented here. In any event, we are obligated to apply the distinction set forth in *Elmore* between evidence a defendant did not actually form the required mental state due to a misperception of reality caused by mental illness, which is allowable under section 28, subdivision (a), and a defense based on a pure delusion, which is not. The latter, according to *Elmore*, is reserved for the sanity phase. (*Elmore, supra*, 59 Cal.4th at pp. 140–142, 145–146.)

criminal act, i.e., he was killing a human being rather than a demon. Such a claim may be made but must be made during the sanity phase of the trial." (*Id.* at pp. 1210–1211.)

Here, as in *McGehee*, McGraw's argument is essentially a claim of insanity foreclosed by the reasoning of *Elmore*. McGraw claims he is entitled to an instruction on involuntary manslaughter because there is evidence in the record his delusions prevented him from understanding that shooting Garfield in the head could kill him. In other words, McGraw's delusions prevented him from understanding the nature and quality of his act.[3] (§ 25, subd. (b).) This is not a misperception of facts; it is pure delusion. (*Elmore*, *supra*, 59 Cal.4th at pp. 137, 146.)

McGraw argues his diminished actuality claim is not based entirely on delusion, pointing to facts that supported the trial court's decision to instruct on self-defense, such as Garfield's (very real) bullying of McGraw. (See *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1409.) The argument is misplaced. The question here is not whether objective facts supported McGraw's fear of Garfield, which warranted an instruction on self-defense. The question is whether objective facts supported McGraw's alleged lack of malice, which is the foundation for an instruction on diminished actuality. The only evidence supporting that contention is the testimony regarding McGraw's delusions.

Finally, McGraw attempts to distinguish *McGehee* on the basis that the defendant in that case admitted having formed an intent to kill. (*McGehee, supra*, 246 Cal.App.4th at p. 1208.) But the issue is whether the defendant seeks an instruction based solely on delusions. (*Elmore*, *supra*, 59 Cal.4th at pp. 139–140.) That was the case in *McGehee* (he intended to kill a demon, not his mother). (*McGehee*, at p. 1210.) It is the case here, too.

B.

McGraw argues, and the People concede, the case should be remanded because a 2017 amendment to section 12022.5, subdivision (c) allows the trial court to decide

[3] McGraw made the same argument in the sanity phase of the trial.

whether the firearm enhancement should be stricken. We agree the trial court should have an opportunity to exercise its discretion. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079–1082.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated, and the matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under section 12022.5, subdivision (c).

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BURNS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.